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Supreme Court, U.S.
FILED

97 1104 DEC 31 1997

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No. _____

In the

Supreme Court of the United States

October Term, 1997

YVETTE FARMER,
Petitioner,

v.

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA,
Respondent.

Petition for Writ of Certiorari to the Nevada Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Title VII of the Civil Rights Act of 1964, as amended, permit employers to take race into account for purposes other than remedying past discrimination?

2. May an employer use a race based hiring scheme to refuse to hire a woman, a member of a protected class under Title VII, and later hire that woman and discriminate against her in her compensation in order to promote an undefined goal of "diversity"?

PARTIES TO THE PROCEEDING

The petitioner (plaintiff-respondent in the courts below) is Yvette Farmer.

The respondent (defendant-appellant in the courts below) is the University and Community College System of Nevada.

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INTRODUCTION

"Does Title VII of the Civil Rights Act of 1964, as amended, permit employers to take race into account for purposes other than remedying past discrimination?" This question was accepted by this Court in *Piscataway Township Board of Education v. Taxman*, 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997). Although a last minute settlement removed the *Taxman* case from this Court's calender, this important question is presented here. The Third Circuit Court of Appeals answered this question in the negative. *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547. In this case, the court below rejected the reasoning of the Third Circuit and answered this question in the affirmative, allowing the University of Nevada at Reno (University) to make employment decisions based on race in order to diversify its faculty.

The question of to what extent, if any, racial preferences can be used to achieve the amorphous goal of racial diversity is causing a great deal of confusion among the lower courts. A decision in this case regarding the permissible use of race in employment decisions can only clarify this unsettled area of the law. Petitioner, Yvette Farmer, requests this Court to grant the petition for writ of certiorari to resolve the issue of whether Title VII permits an employer to take race into account for purposes other than remedying prior discrimination.

OPINION BELOW

The decision of the Nevada Supreme Court is reported at 930 P.2d 730 (1997), and is reproduced as Appendix (App.) A. Page references are to the version in the Appendix.

JURISDICTION

The complaint in this action was filed in the Second Judicial District Court of the State of Nevada, County of Washoe, alleging, among other things, a violation of Title VII of the Civil Rights Act of 1964, as amended. A jury returned a verdict in petitioner's favor. An appeal was filed timely. The decision of the Nevada Supreme Court was entered January 3, 1997. Petitioner filed a timely petition for rehearing that was denied on November 21, 1997. App. B-1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(2)a provides:

> **§ 2000e-2. Unlawful employment practices**
>
> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such

individual's race, color, religion, sex, or national origin.

The Equal Pay Act, 29 U.S.C. § 206(d)(1), provides:

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

STATEMENT OF THE CASE

This case asks the question of whether a public employer may discriminate on the basis of race and gender under the guise of seeking to achieve a racially diverse faculty. This is a case of egregious discrimination against petitioner, Yvette Farmer, where the government initially refused to hire her and then paid

her substantially less than a minority colleague because she was white. Unlike this Court's more recent cases involving race and gender based preferences "this is not a case of remedial affirmative action." App. A-14 n.2 (Springer, J., dissenting).

The University adopted an unwritten minority bonus preference policy allowing each department to hire an additional faculty member for every minority candidate hired. App. A-2. In 1990, the University announced an opening in its sociology department. Yvette Farmer, a white female, and Johnson Makoba, a black male who had recently emigrated from Uganda, were two of the three finalists. App. A-2. Although Farmer asserted on appeal that the record established she was more qualified for the position, the court below found that Farmer and Makoba "were equal in most respects." App. A-7. The University's hiring guidelines require departments to interview more than one candidate; however, this procedure may be waived. App. A-2. Based on the race of the candidates, the sociology department sought and obtained a waiver allowing it to interview only Makoba. App. A-2. Makoba was hired and was paid a premium over and above the advertised salary for the position. App. A-3.

One year later, as a result of the unwritten minority bonus preference policy that allows each department to hire an additional faculty member, Yvette Farmer was hired. App. A-3. The University, however, continued to discriminate against her. Although Johnson Makoba and Yvette Farmer were hired to perform the same task, teaching sociology, the University paid Makoba a starting salary of $35,000 with a $5,000 increase after the completion of his dissertation. *Id.* Makoba's initial salary exceeded the advertised salary range to avoid a bidding war with two prestigious universities scheduled to interview Makoba[1] (App. A-3) because "qualified minority applicants, who are in short supply, can command premium salaries in the open

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[1] Those universities are Brandeis and Northwestern.

market." App. A-10-11. Farmer, on the other hand, received a starting salary within the advertised range of $31,000 with a $2,000 raise after the completion of her dissertation. This salary differential eventually widened to $10,838. App. A-3.

In January 1993, Yvette Farmer filed a complaint alleging, among other things, that the University had violated Title VII of the Civil Rights Act and the Equal Pay Act. App. A-3. A jury returned a verdict in her favor and awarded her $40,000 in damages. App. A-4. In a sharply divided opinion the Nevada Supreme Court reversed.

A. The Majority Opinion

Relying on *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), the court below found that the University's preference program did not violate Title VII. First, the court held "[t]he university's attempts to diversify its faculty by opening up positions traditionally closed to minorities satisfies the first factor under *Weber*." App. A-7.[2] The court then turned to the second *Weber* factor and concluded that because the University's faculty was 87-89% white and only 1% black and because the University was attempting to attain, as opposed to maintain, a racial balance, its minority bonus preference policy did not "unnecessarily trammel the interests of white employees." *Id.* The court made this finding despite the fact that the University's unwritten policy does not define at what point its faculty becomes diverse enough.

Moreover, according to the court below, the University's desire to achieve a racially diverse faculty was sufficiently

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[2] Despite the majority's loose reference to the "traditionally segregated job categories" language of the *Weber* opinion, there is no evidence in the record that shows faculty positions at the University have been closed to minorities. As will be explained in greater detail *infra*, the University faculty is not marked by the type of "manifest imbalance" found in *Weber* and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

analogous to "the constitutionally permissible attainment of a racially diverse student body countenanced by the Bakke Court." App. A-7 (citing *Regents of the University of California v. Bakke*, 438 U.S. 265, 314-18 (1979) (opinion of Powell, J.). The court explained that the University had a compelling interest in achieving a racially diverse faculty and its unwritten minority bonus preference policy was designed to achieve this goal.

> A failure to attract minority faculty perpetuates the University's white enclave and further limits student exposure to multicultural diversity. Moreover, the minority bonus policy is narrowly tailored to accelerate racial and gender diversity. Through its affirmative action policies, the University has achieved greater racial and gender diversity.

App. A-7.

The court also ruled that the University's interest in promoting racial diversity was sufficient to save it from liability under the Equal Pay Act (EPA). 29 U.S.C. § 206(d). Under the EPA an employer may justify a differential in pay "based on any factor other than sex." 29 U.S.C. § 206(d)(1)(iv). After recognizing the conflict among the federal circuit courts over the meaning of the "factor other than sex defense," the court interpreted this provision as allowing an employer to demonstrate a business-related reason for the wage disparity. App. A-10. Applying this test, the court held that the University's desire to achieve a racially diverse faculty provided a bona fide business-related reason for the difference between Johnson Makoba's and Yvette Farmer's pay. "Clearly, the University had a bona fide business-related reason for attaining a racially diverse faculty." App. A-10.

For these reasons, the Nevada Supreme Court reversed the decision of the trial court. App. A-13.

B. Justice Springer's Dissent

A dissenting justice rejected the majority's interpretation of Title VII allowing the University to discriminate against Yvette Farmer based on her race. Citing to *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547, Justice Springer explained, "Congress neither addressed nor embraced racial diversity 'for education's sake' as a purpose of Title VII, and nothing in federal case law, including the Supreme Court's equal protection cases, supports recognition of such a purpose." App. A-14 n.1. (Springer, J., dissenting). After determining that racial discrimination in the name of diversity did not satisfy Title VII's antidiscrimination mandate, Justice Springer turned to the vernacular, as well as the case law, of the Equal Protection Clause, finding "no authority" for the majority's assertion that "fostering a culturally and ethnically diverse faculty" was a sufficiently compelling reason to justify the University's discrimination against Yvette Farmer. App. A-13. Justice Springer based his decision on the Fifth Circuit's opinion in *Hopwood v State of Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

> After review of the relevant Supreme Court cases, I turn to Hopwood and conclude that the racially discriminatory action taken by the University is constitutionally impermissible. "Cultural and ethnic diversity" simply cannot justify the University's undisguised racial discrimination in the pursuit of a more racially heterogenous faculty.

App. A-14 (footnote omitted).

Justice Springer noted that the University "made no showing whatsoever that it had discriminated against blacks in hiring." App. A-14 n.2. In any event, "it is difficult to see how hiring a recent emigrant from Africa would be an appropriate

remedy for prior discrimination against black Americans." App. A-14 n.2.[3]

C. Petition for Rehearing

On January 29, 1997, Yvette Farmer filed a timely petition for rehearing in the Nevada Supreme Court. The petition requested the court below to reconsider its opinion in light of the opinion rendered by the Third Circuit Court of Appeals in *Taxman v. Piscataway*. On June 27, 1997, this Court granted the Piscataway School Board's petition for a writ of certiorari. *Piscataway v. Taxman*, 117 S. Ct. 2506. On November 21, 1997, it was announced that the Piscataway Board of Education and Sharon Taxman had reached a settlement and their case would not be heard by this Court. Louis Freedberg, *Race-Based Layoff Case Settled*, S.F. Chron., Nov. 22, 1997, at A1. The same day the *Taxman* settlement was announced, the Nevada Supreme Court denied Yvette Farmer's petition for rehearing. App. B-1. Yvette Farmer now files this petition for a writ of certiorari, requesting this Court to consider the issue of whether Title VII allows employers to base employment decisions such as hiring and compensation, on the race and gender of the applicants in the name of "diversity."

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decision of the Third Circuit Court of Appeals in *Taxman v. Board of Education of the Township of Piscataway*. In *Taxman* the court held that "[g]iven the clear antidiscrimination mandate of Title VII, a nonremedial affirmative action plan, even one with a laudable

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[3] Justice Shearing also dissented asserting that Yvette Farmer should have prevailed under her Equal Pay Act claim. App. A-15.

purpose, cannot pass muster." 91 F.3d at 1550. Stated differently, "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." *Taxman*, 91 F.3d at 1558. The court below, rejected this reasoning, finding instead that the University's attempts to diversify its faculty satisfies the first factor in *Weber*. App. A-7. The court also stated that in its view, the University had a compelling interest in fostering a racially diverse faculty in order to expose its students to "a culturally and ethnically diverse faculty." *Id.* This view assumes that race is a valid proxy for cultural attributes, thereby stereotyping individuals on the basis of race. The significance of this conflict cannot be overstated: Citizens of Nevada have less protection under Title VII than do citizens of Delaware, New Jersey, and Pennsylvania. The meaning of the Civil Rights Act of 1964 should not be dependent upon the accident of geography. This Court should grant the petition to resolve the conflict over whether Title VII allows an employer to grant a nonremedial racial preference to promote racial diversity.

The court below has decided an important question of federal law that should be settled by this Court. The question presented by this case, whether Title VII allows an employer to take race into account for purposes other than remedying prior discrimination, has already been deemed compelling enough by this Court to warrant review. *Piscataway Township Board of Education v. Taxman*, 117 S. Ct. 2506. Although the *Taxman* case settled, the question presented by that case remains unsettled. This Court has not yet established "the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups." *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. at 642 (Stevens, J., concurring). This case presents this Court with an opportunity to establish a uniform rule regarding to what extent, if any, Title VII allows an employer to base employment decisions on race or gender for nonremedial purposes.

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE THE CONFLICT OVER WHETHER TITLE VII ALLOWS AN EMPLOYER TO GRANT A NONREMEDIAL RACIAL PREFERENCE TO PROMOTE RACIAL DIVERSITY

The decision below conflicts with the *Taxman* decision rendered by the Third Circuit Court of Appeals on the meaning of Title VII of the Civil Rights Act of 1964. Title VII provides:

> It shall be an unlawful employment practice for an employer--
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

The language of the statute appears to stand as an absolute bar to all racial discrimination in employment. However, in 1979 this Court held that Title VII does not prohibit all race-conscious employment decisions. *United Steelworkers of America v. Weber*, 443 U.S. at 193. In *Weber* this Court upheld a program that granted racial preferences because its purposes "mirror[ed] that of the statute" and it did not "unnecessarily trammel the interests of white employees." *Id.* at 208. In 1987, this Court reaffirmed the analytical framework established in *Weber*. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. at 627.

Both the Nevada Supreme Court and the Third Circuit have been called upon to determine whether Title VII, as interpreted by *Weber* and *Johnson*, allows an employer to discriminate on the basis of race to achieve a racially diverse workforce. These

two courts have reached diametrically opposed conclusions. The Nevada Supreme Court held that the University's interest in attaining a racially diverse faculty allowed it to discriminate against Yvette Farmer without running afoul of Title VII of the Civil Rights Act of 1964. App. A-7. In direct contrast, the Third Circuit ruled that Title VII does ***not*** allow an employer to grant a preference to one group or individual--while at the same time necessarily discriminating against another group or individual--on the basis of race to achieve a racially diverse workforce. *Taxman*, 91 F.3d at 1550.

Like both *Weber* and *Johnson*, *Taxman* involved a program that granted racial preferences. *Taxman* differed from these prior cases in that its racial preference program was not adopted to remedy a pattern of prior discrimination, but instead was implemented to achieve a racially diverse teaching faculty. In 1989, the Piscataway Board of Education was faced with the unenviable task of having to lay off a teacher in the business department at Piscataway High School. New Jersey law requires tenured instructors to be laid off in reverse order of seniority. There was a tie in seniority status between Sharon Taxman, who is white, and Debra Williams, who is black, both teachers having been hired on the same day nine years earlier. *Taxman*, 91 F.3d at 1551. In prior situations, the seniority tie was broken through a random selection process (such as drawing lots or drawing numbers out of a container). In this case, the board decided that there was educational value in preserving a racially diverse faculty and decided to retain Debra Williams who was the only minority teacher in the business department. Sharon Taxman was laid off and suit was filed against the board under Title VII.

Applying the *Weber* criteria, the Third Circuit, sitting *en banc*, held that "[w]hile the Court in Weber and Johnson permitted some deviation from the antidiscrimination mandate of the statute in order to erase the effects of past discrimination, these rulings do not open the door to additional non-remedial

deviations." *Taxman* 91 F.3d at 1558. The court considered whether the employer's interest in a racially diverse faculty mirrored the purpose of Title VII. The court noted that Title VII was enacted to achieve two primary goals: to end discrimination in the workplace and to remedy the segregation and underrepresentation of minorities caused by prior discrimination. According to the Third Circuit, neither of these interests were advanced by the board's decision to terminate Sharon Taxman's employment. "Thus, based on our analysis of Title VII's two goals, we are convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and, therefore, cannot satisfy the first prong of the Weber test." *Taxman*, 91 F.3d at 1557. The court also found that the board's policy violated the second prong of the *Weber* test. "In addition to containing an impermissible purpose, the policy 'unnecessarily trammels the interests of the [nonminority] employees.'" *Taxman*, 91 F.3d at 1565 (quoting in part *Weber*, 443 U.S. at 208).

The Third Circuit was not unanimous in its decision that Title VII prohibits an employer from using race for nonremedial purposes. Four judges dissented from this holding. Chief Judge Sloviter, in an opinion joined by Judges Lewis and McKee, argued that "the Board's purpose of obtaining the educational benefit to be derived from a racially diverse faculty is entirely consistent with the purposes animating Title VII and the Civil Rights Act of 1964." *Taxman*, 91 F.3d at 1527 (Sloviter, J., dissenting). Judge Scirica was of the view that Title VII did not prevent the school board "from preferring one equally qualified teacher over another for a valid educational purpose." *Taxman*, 91 F.3d at 1577 (Scirica, J., dissenting). Judge McKee, in a separate dissenting opinion, explained: "The majority's conclusion that affirmative action plans not limited to attempts to remedy past discrimination run afoul of Title VII simply ignores the legislative history that Weber and Johnson require us to consider." *Id.* at 1578 (McKee, J., dissenting).

Faced with the identical question addressed by the Third Circuit in *Taxman*, the Nevada Supreme Court reached the opposite conclusion. Starting with the *Weber* and *Johnson* analysis, the court below concluded that Title VII allows a university to discriminate on the basis of race to achieve a racially diverse faculty. The court stated its view that the attainment of a racially diverse faculty was "sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court." App. A-7.[4] The court then found the desire to achieve a racially diverse factually satisfied Title VII as interpreted by *Weber*. App. A-7. The court explained that the University had a compelling interest in attaining a racially diverse faculty because the failure to attract minority faculty limited student exposure to racial and ethnic diversity. *Id.*[5]

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[4] Where the *Farmer* court found the discussion in Justice Powell's opinion in *Bakke* regarding the desirability of a diverse student body "sufficiently analogous" to the University's desire to achieve a diverse faculty, the *Taxman* court expressly refused to rely on *Bakke* for the proposition that diversity is a permissible goal under Title VII.

> Bakke's factual and legal setting, as well as the diversity that universities aspire to in their student bodies, are in our view, so different from the facts, relevant law and the racial diversity purpose involved in this case that we find little in Bakke to guide us.

Taxman, 91 F.3d 1562. Not only are the lower courts divided on whether Title VII allows nonremedial preferences, they are unable to agree on the case law that should be used to guide their decision.

[5] Yvette Farmer did not challenge the University's unwritten minority bonus preference policy under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The court below did raise the issue and found that the plan "pass[ed] constitutional muster." App. A-7. The court concluded: "The University demonstrated that it has a compelling interest in fostering

(continued...)

Turning to the second prong of the *Weber* test the court below again diverged from the Third Circuit. The Nevada Supreme Court found that the University's minority bonus preference policy did not unnecessarily trammel the interests of white employees because white professors held 87-89% of the full time faculty positions, whereas black professors held only 1% of those posts. App. A-7. The court concluded that because the University's preference program conformed to both of the *Weber* prongs, Yvette Farmer's rights under Title VII had not been violated. *Id.*

The Nevada Supreme Court was not unanimous in its rejection of the *Taxman* decision. In dissent, Justice Springer cited *Taxman* with approval for the proposition that

> Congress neither addressed nor embraced racial diversity "for education's sake" as a purpose of Title VII, and nothing in federal case law, including the Supreme Court's equal protection cases, supports recognition of such a purpose.

App. A-14 n.2 (Springer, J., dissenting) (citing *Taxman*, 91 F.3d at 1558-63).

Justice Springer also rejected the majority's conclusion that diversity was a sufficiently compelling reason for intentional discrimination by Nevada's public university. App. A-14 ("'Cultural and ethnic diversity' simply cannot justify the University's undisguised racial discrimination in the pursuit of a more racially heterogeneous faculty."). *Id.* (footnote omitted).

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[5] (...continued)
a culturally and ethnically diverse faculty." App. A-7. This conflicts with the law of the Fifth Circuit where "any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment." *Hopwood v. State of Texas*, 78 F.3d at 944.

As it now stands, the protections afforded by Title VII of the Civil Rights Act differ significantly depending on the jurisdiction were the suit is brought. In the Third Circuit, employers are prohibited from discriminating against employees (or potential employees) on the basis of race in order to achieve a racially diverse workforce. In Nevada, however, employees have no such protection, and can be denied employment if their prospective employer decides that it wishes to have a more racially diverse workforce. The two appellate courts that have addressed this issue have reached different conclusions. Future courts faced with this issue will be forced to chose between the reasoning of the Third Circuit and the reasoning of the Nevada Supreme Court which, of course, will only serve to exacerbate the current conflict of authority. This Court should grant the petition to resolve this critical issue currently dividing the lower courts.

II

THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE GOVERNMENT MAY GRANT RACE OR GENDER BASED PREFERENCES TO ACHIEVE NONREMEDIAL INTERESTS

The language of Title VII proscribes employment discrimination against any individual on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). This Court has previously allowed race and gender to be used in employment decisions in order to remedy the effects of prior discrimination. *Weber*, 443 U.S. 193, and *Johnson*, 480 U.S. 616. *Taxman*, 91 F.3d at 1558 (citing *Weber* and *Johnson*). This Court has not been provided an opportunity to determine whether Title VII permits employers to discriminate on the basis of race or gender for nonremedial purposes, such as diversifying a workforce. This case provides that opportunity.

A. The *Weber* and *Johnson* Decisions Permit Consideration of Race or Gender Only to Remedy Prior Discrimination

On two prior occasions this Court has reviewed voluntarily adopted employment practices that granted preferences to some employees, while at the same time discriminating against others. In neither of these cases, however, was the employer using race or gender in order to diversify its workforce.

In *Weber*, this Court addressed the legality of a voluntary racial preference program adopted by the Kaiser Aluminum & Chemical Corporation requiring 50% of the openings in an in-plant craft-training program be reserved for black employees, until the percentage of black craft-workers equaled the percentage of blacks in the local labor force. *Weber*, 433 U.S. at 198. Prior to the adoption of the plan, the local labor force was about 39% black whereas the craft-work force was less than 2% black. Not surprisingly, Kaiser denied that it had discriminated against blacks in the past, but did concede "that its past hiring practices may be subject to question." *Weber*, 443 U.S. at 210 (Blackmun. J, concurring). This Court upheld the Kaiser plan, finding that its remedial purpose "mirror[ed]" that of Title VII. *Weber*, 443 U.S. at 208.

In 1987, this Court considered another racial preference program under Title VII. In *Johnson*, the County of Santa Clara, California, adopted a gender based preference program based on its conclusion that "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons." *Johnson*, 480 U.S. at 260. Shortly thereafter, the county announced it would promote one of its current employees to the position of road dispatcher. Significantly, at the time this announcement was made, ***none*** of the 238 positions in this job

category was held by a woman. 480 U.S. at 636. Diane Joyce and Paul Johnson were two of the seven qualified finalists for the position. Diane Joyce was promoted and Paul Johnson sued. 480 U.S. at 625.

Concluding that the plan was designed to eliminate imbalances in traditionally segregated job categories, this Court held that the plan satisfied the first prong of the *Weber* test. *Johnson*, 480 U.S. at 637. This Court also held that the plan did not unnecessarily trammel the rights of male employees because gender was only a "plus" factor, Paul Johnson had no "firmly rooted expectation" of receiving the job, and although he was denied a promotion, he retained his position with the county. *Id.* at 638. Finally, the plan was "intended to *attain* a balanced work force, not to maintain one." *Id.* at 639 (emphasis in original).[6]

Weber and *Johnson* allowed employers to deviate from the plain language of Title VII and utilize race and gender discrimination in employment decisions because the plans challenged in those cases mirrored the purposes of the statute--the remediation of past discrimination. However, while authorizing the discriminatory actions taken in those cases this Court made no attempt to define the limits on discriminatory

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[6] In *Johnson*, this Court held that a public employer's obligations under Title VII were not identical to their constitutional obligations. *Johnson*, 480 U.S. at 627 n.6. Four justices, however, rejected this idea. "In my view the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Johnson*, 480 U.S. at 649 (O'Connor, J., concurring). In addition, Justice Scalia, joined by Justice White and Chief Justice Rehnquist, stated "it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution." *Id.* (Scalia, J., dissenting). This case presents this Court with an opportunity to revisit the issue of whether Title VII requires a public employer to satisfy the requirements of the Constitution.

employment decisions authorized by Title VII. "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action programs." *Weber*, 443 U.S. at 208. "[T]he opinion does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups." *Johnson*, 480 U.S. at 642 (Stevens, J., concurring). This case provides an ideal vehicle to provide further definitions to "the line of demarcation between permissible and impermissible" race and gender based employment decisions.

B. This Court Should Decide Whether Title VII Allows Employers to Discriminate on the Basis of Race to Achieve Diversity

As the Third Circuit recently explained, *Weber* and *Johnson* allow for new preference plans "to erase the effects of past discrimination, ***these rulings do not open the door to additional non-remedial deviations.***" *Taxman*, 91 F.3d at 1558 (emphasis added).

This Court should grant this petition to determine whether nonremedial racial preferences, such as the one utilized by the University in this case, are permissible under Title VII. This issue was squarely presented by the *Taxman* case. There, "[t]he Board's affirmative action policy did not have 'any remedial purpose.'" *Taxman*, 91 F.3d at 1550. Unfortunately, that case settled before this Court had an opportunity to address this important issue. That issue, however, is presented by this case.

In this case the University is not attempting to remedy the effects of its own past discrimination. As Justice Springer observed "this is not a case of remedial affirmative action." App. A-14 n.2. (Springer, J., dissenting). There is "no showing whatsoever that the University has discriminated against minorities in hiring." *Id.* Moreover, it is difficult to see how hiring a recent emigrant from the nation of Uganda would in any

way remedy prior discrimination against American racial minorities. *Id.*

Nor does this case involve the type of conspicuous imbalance of racial minorities or women that was at issue in both *Weber* and *Johnson*. In *Johnson*, this Court held that under Title VII an employer need not point to its own prior discriminatory practices or even evidence of an "arguable violation" by the employer. *Johnson*, 480 U.S. at 630. However, an employer was required to show a "conspicuous imbalance in traditionally segregated job categories." *Id.*

Although this Court has not yet clarified what "statistical imbalance" is necessary to justify a race-conscious remedial preference under Title VII,[7] it is clear that none of the glaring statistical disparities present in *Weber* and *Johnson* are present in this case. In *Weber* 39% of the local labor force was black while only 1.83% of the crafts-work force at the Kaiser plant was black. *Weber*, 443 U.S. at 210. The employer in question in *Weber* also conceded that its past hiring practices "may be subject to question." *Weber*, 443 U.S. at 209 (Blackmun, J., concurring). In *Johnson*, none of the 238 positions in the applicable job category was held by a woman. *Johnson*, 480 U.S. at 621. Moreover, the County's hiring statistics demonstrated that women were "concentrated in traditionally female jobs." *Id.* at 634.

Here, by contrast, between 1989 and 1991, 87% to 89% of the full-time faculty at the University were white. The 1990 United States Census shows that the City of Reno was 86% white and the State of Nevada was 88.3% white. *United States Bureau of the Census Population Paper Listing 49, Population*

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[7] "Unfortunately, the Court today gives little guidance for what statistical imbalance is sufficient to support an affirmative action plan." *Johnson*, 480 U.S. at 652 (O'Connor, J., concurring).

of States by Race and Hispanic Origin, April 1, 1990.[8] The University's faculty is nearly a mirror image of the surrounding community served by the University. Although 1% of the University's faculty was black between 1989 and 1991, the 1990 census reveals that the City of Reno was only 2.8% black. The racial composition of the University's full-time faculty closely resembles the average racial balance of institutions of higher learning in the United States. Between 1989 and 1991, 87-89% of the University's full-time faculty was white, whereas in 1992, 86.8% of the full-time instructional faculty and staff in institutions of higher learning in the United States was white. United States Department of Education, *Digest of Educational Statistics 1995*, at 231. Certainly the racial composition of the University's full-time faculty reflects the racial makeup of the City of Reno, the State of Nevada, and the average of all United States institutions of higher learning. This hardly rises to the level of a "conspicuous imbalance" that the Court found in *Weber* and *Johnson*.[9]

Moreover, as this Court has explained on a number of prior occasions, in determining whether an imbalance exists the

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[8] The Census includes persons of Hispanic origin as "white."

[9] The use of statistics to measure racial diversity raises an interesting question: At what point does the University's faculty become diverse enough? As the district court observed: "Is a diverse faculty one which is 10% minority, 20% minority, or 50% minority?" *United States v. Board of Education of the Township of Piscataway*, 832 F. Supp. 836, 850 (D.N.J. 1993). Here the University faculty was composed of between 13% and 11% full-time minority faculty members. App. A-2. Is there some threshold the University will eventually cross when it becomes diverse enough to stop using racial preferences in its hiring decisions? Or will the University be able to make race based employment decisions in perpetuity to increase the diversity of its faculty? The University's unwritten policy makes no attempt to answer this question and does not specify at what point its faculty becomes diverse enough.

relevant comparison is between the percentage of minorities in the employer's workforce and the percentage of minorities in the area labor force, or the general population, who possess the requisite qualifications.

> Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. *See Hazelwood School District v. United States* (citations omitted) (must compare percentage of blacks in employer's work ranks with the percentage of qualified black teachers in area labor force in determining underrepresentation in teaching positions).

Johnson, 480 U.S. at 632.

As the Court below explained, there is "a perceived shortage of black Ph.D. candidates." App. A-3. "It is undisputed that qualified minority applicants, who are in short supply, can command premium salaries in the open market." App. A-10. Comparing the University's faculty with those members of the "labor force who possess the relevant qualifications" demonstrates that the University is not scarred by the type of manifest imbalance present in *Weber* and *Johnson*.

In *Weber* this Court reviewed an industry where black workers were unwelcome. "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper ground for judicial notice." *Weber*, 443 U.S. at 198 n.1. Here the opposite is true. As the Nevada Supreme Court explained, "the University justified its premium offer as a method of preventing a bidding war between two prestigious universities slated to interview Makoba." App. A-2. Faced with the shortage of qualified minority applicants and a desire to diversify its faculty the University deemed it necessary to pay its black professors significantly more than their white counterparts. (Johnson Makoba started at $35,000 with an

increase to $40,000 upon the completion of his dissertation. In contrast, a year later, Yvette Farmer started at $31,000 with an increase to $33,000 upon the completion of her dissertation, even though she performed the same job as Mr. Makoba.) This is simply not a case where the University is attempting to remedy its own past discrimination or correct a conspicuous racial imbalance caused by the effects of past discrimination. Instead, the University hired Johnson Makoba and then paid him a premium salary in order to avoid an "all-out bidding war with other educational institutions." App. A-11.

The heart of the court's opinion makes it clear that the University initially hired Johnson Makoba and not Yvette Farmer because it wished to diversify its teaching faculty.

> The University demonstrated that it has a compelling interest in fostering a culturally and ***ethnically diverse faculty***. A failure to attract minority faculty perpetuates the University's white enclave and further limits student exposure to ***multicultural diversity***. Moreover, the minority bonus policy is narrowly tailored to accelerate ***racial and gender diversity***. Through its affirmative action policies, the University achieved greater ***racial and gender diversity*** by hiring Makoba and Farmer.

App. A-7. (emphasis added).

In direct conflict with the Third Circuit in *Taxman*, the Nevada Supreme Court squarely held that the University's attempts to diversify its faculty satisfy the first prong of the *Weber* test. App. A-7. This expansion of *Weber* and *Johnson* should be reviewed by this Court. Allowing an employer to circumvent the plain language of Title VII in order to acquire a "diverse" workforce would become the exception that swallows the rule. An employer will always be able to claim that in order to diversify its workforce, it must hire (or promote) based on the race of the applicants. Racial diversity is an amorphous goal

with no measurable meaning. There simply is no discernible line where a workforce is magically transformed from a nondiverse workforce into a diverse workforce. Instead, an employer can always claim that it wishes to make its workforce ***more*** diverse than it already is. Armed with this rationale any employer could escape liability under Title VII.

C. This Court Should Decide Whether Preferences Given to Achieve Diversity Unnecessarily Trammel the Rights of Other Employees

Both *Weber* and *Johnson* teach that in order for a racially discriminatory policy to survive scrutiny under Title VII the plan must not "unnecessarily trammel the interests of white employees." *Johnson*, 480 U.S. at 630 (quoting *Weber*, 443 U.S. at 208). In addition, such a plan must be a "temporary measure." *Weber*, 443 U.S. at 208. The Third Circuit in *Taxman* has already concluded that a plan designed to achieve racial diversity unnecessarily trammels the rights of nonminority employees.

In *Taxman*, the court was struck by the Piscataway plan's lack of definition and structure.

> [T]he Board's policy, devoid of goals and standards, is governed entirely by the Board's whim, leaving the Board free, if it so chooses, to grant racial preferences that do not promote even the policy's claimed purpose. Indeed, under the terms of this policy, the Board, in pursuit of a "racially diverse" work force, could use affirmative action to discriminate against those whom Title VII was enacted to protect. Such a policy unnecessarily trammels the interests of nonminority employees.

Taxman, 91 F.3d at 1546.

In this case, the University's unwritten minority bonus preference policy suffers from the same defect. Here, the

program, coupled with the University's current desire to achieve a racially diverse faculty, was used to favor a black man over a white woman. The desire to achieve a diverse faculty could just as easily been used to favor a female applicant over a male applicant. Between 1989 and 1991 the University's full-time faculty was 87 to 89% white, while the surrounding community was 86% white. During this same time period, 25 to 27% of the full-time faculty were women. Logic would dictate that roughly 50% of the surrounding community was female. University administrators could have decided to increase gender diversity at the University thereby favoring female applicants over male applicants. Under the Nevada Supreme Court's rationale, "diversity" is available as a talisman to make legal any refusal to hire any individual because of the individual's race, color, religion, sex, or national origin. This rationale eviscerates the protections of Title VII.

The Nevada Supreme Court expanded the holdings of *Weber* and *Johnson* in another significant way that warrants review by this Court. Both *Weber* and *Johnson* involved promotion decisions. In each case, this Court found it significant that although Brain Weber and Paul Johnson were not promoted, they did not lose their existing jobs. *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 639. Because they remained eligible for other promotions their rights were not unnecessarily trammeled.

In this case, although Yvette Farmer was eventually hired, the University continued to discriminate against her in order to maintain its racially diverse faculty. Johnson Makoba, a black male professor of sociology received a premium over and above the advertised salary for the position of $35,000 a year and a $5,000 increase upon the completion of his dissertation. Yvette Farmer, a white female professor of sociology, received a starting salary within the advertised range of $31,000 and was given only a $2,000 increase after her dissertation was completed. App. A-3. The wage disparity eventually widened

to $10,838. *Id.* Yvette Farmer challenged this pay disparity under both Title VII and the Equal Pay Act. *Id.* The Nevada Supreme Court rejected this challenge finding that the University's interest in attaining a racially diverse faculty allowed it to pay Yvette Farmer significantly less money than Johnson Makoba. Addressing the claim under the Equal Pay Act, the court below held that the University had a bona fide business related reason for attaining a racially diverse workforce and that the pay "differential was based on a factor other than sex." App. A-11 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974)).

In other words, so long as a university (or, presumably, any employer) desires to achieve a racially diverse workforce it can pay its employees different wages for the same work based on immutable characteristics without running afoul of the EPA or Title VII. Here the University paid a white female professor significantly less than a black male professor, and the court below validated this dual pay scale. Under this reasoning, the perceived need for racial diversity, or more racial diversity, becomes an absolute defense to any claim brought pursuant to the EPA or Title VII. Surely Congress did not intend for liability under either Title VII or the EPA to be so easily avoided. The University's dual pay system goes far beyond the plans ratified by this Court in *Weber* and *Johnson*.

Finally, unlike the plans at issue in *Weber* and *Johnson*, the pay differential here is not a "temporary" measure, but instead would presumably last as long as both Yvette Farmer and Johnson Makoba remain at the University. The University has not defined at what point its faculty will become sufficiently diverse. In the absence of any benchmark for measuring when a faculty becomes diverse, the University's affirmative action program has no "logical stopping point." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275 (1986).

CONCLUSION

In departing from the plain language of Title VII, in *Weber*, this Court was careful to emphasize the narrowness of its opinion. *Weber*, 443 U.S. at 200. In *Taxman* the Third Circuit expressed its reluctance to expand the situations where employers may use race, gender, or other immutable characteristics to make employment decisions. *Taxman*, 91 F.3d at 1558. The Nevada Supreme Court, on the other hand, has refused to proceed with such caution. Instead, that court has rendered a decision that invites an employer to use race in any employment decision without running afoul of Title VII, so long as the employer claims that the race based decision was necessary to increase diversity. Given the importance of this issue, and the conflict of authority it is generating, the petition for a writ of certiorari should be granted.

DATED: December, 1997.

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Attorneys for Petitioner

IN THE SUPREME COURT OF NEVADA

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA,	)	**No. 25912**
Appellant,	)	**FILED**
vs.	)	**Jan 03 1997**
	)	**Janette M. Bloom**
YVETTE FARMER,	)	**Clerk of Supreme Court**
	)	**By //J. Richard//**
Respondent.	)	**CHIEF DEPUTY CLERK**

Appeal from a final judgment, pursuant to jury verdict, and from order denying motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Reversed.

Donald Klasic, General Counsel, University of Nevada, Reno,
for Appellant.

Goedert & Michaels, Reno,
for Respondent.

OPINION

STEFFEN, Chief Justice:

Appellant, the University and Community College System of Nevada ("the University"), appeals from a final judgment, pursuant to a jury verdict, awarding respondent Yvette Farmer, an assistant professor of sociology at the University of Nevada, Reno, $40,000.00 in damages for violations of the Equal Pay Act ("the EPA"), Title VII of the Civil Rights Act, and for breach of an employment contract. The primary issues before us are whether the University was entitled to judgment as a matter of law and whether the district court erred by refusing to submit either of two jury instructions.

For reasons set forth hereafter, we reverse.

FACTS

Between 1989 and 1991, only one percent of the University's faculty were black, and eighty-seven to eighty-nine percent of the full-time faculty were white. During this period, twenty-five to twenty-seven percent of the full-time faculty were women. In order to rectify the racial imbalance, the University instituted the "minority bonus policy," an unwritten amendment to its affirmative action policy which allowed a department to hire an additional faculty member following the initial placement of a minority candidate.

In 1990, the University published an announcement regarding an impending vacancy in the sociology department. The announcement for a replacement emphasized a need for proficiency in social psychology and formal organizations, with a stipulated salary range between $28,000.00 and $34,000.00, dependent upon experience and qualifications.

University hiring guidelines require departments to conduct more than one interview; however, this procedure may be waived. Although Farmer was one of the three finalists chosen by the search committee, the University claimed they followed procedural protocol by obtaining a waiver to only interview Johnson Makoba, a black African male emigrant. The department chair recalled that the search committee ranked Makoba first among the three finalists.

Because of a perceived shortage of black Ph.D. candidates, coupled with Makoba's strong academic achievements, the search committee sought approval to initially offer Makoba $35,000.00, with an increase to $40,000.00 upon completing his Ph.D. This initial offer exceeded the advertised salary range of $28,000.00 to $34,000.00. Even though Makoba had not accepted any competing offers, the University justified its premium offer as a method of preventing a bidding war between two prestigious universities slated to interview Makoba. This strategy, according to the University, was designed to preempt other institutions from hiring Makoba.

Farmer claims that she was more qualified for the position initially offered to Makoba. However, the curriculum vitae for both candidates revealed comparable strengths with respect to their educational backgrounds, publishing, areas of specialization, and

teaching experience. The search committee concluded that despite some inequalities, their strengths and weaknesses complemented each other; hence, as a result of the additional position created by the minority bonus policy, the department hired Farmer one year later. Although the University started Makoba at $35,000.00 with a $5,000.00 increase upon completing his dissertation, Farmer was offered a starting salary of $31,000.00 and a $2,000.00 raise after completion of her dissertation. This, according to the Dean of the College of Arts and Science, was slightly above the mean for new hires in the social sciences.

Starting with an initial pay differential of $7,000.00 upon completion of their dissertations, the pay gap has since widened to $10,838.00 because of Makoba's additional year of employment and differences in merit increases granted to Makoba and Farmer.

On January 13, 1993, Farmer filed a complaint alleging four causes of action. She first claimed that the University violated the Equal Pay Act by paying her unequal wages for equal work relative to a male employee of similar qualifications. Her second cause of action alleged race and gender violations under Title VII of the Civil Rights Act as amended in 1991. Farmer's third cause of action alleged that the University breached its employment contract with her by failing to abide by its promulgated policies delineating the terms and conditions of employment. Her fourth cause of action alleged a breach of the implied covenant of good faith and fair dealing.

The district court granted the University's motion for summary judgment as to Farmer's fourth cause of action, but denied summary judgment regarding the first three causes of action.

After the close of evidence, the district court rejected the following jury instruction offered by Farmer:

> The Equal Pay Act specifically forbids that Dr. Makoba's salary should be lowered to make two rates of pay equal.

The University then offered the following proposed jury instruction:

> The implementation by an employer of a race- conscious affirmative action policy designed to remedy the effects of past discrimination against a traditionally disadvantaged group, particularly to remedy a manifest imbalance in a traditionally segregated job category, is not a violation of Title VII of the Civil Rights Act, provided the rights of other persons are not unnecessarily trammeled or impeded.

The district court also rejected this instruction.

The jury returned a verdict in Farmer's favor for her first three causes of action, awarding her $40,000.00 in damages. The University timely filed a motion for a judgment notwithstanding the verdict, or in the alternative, for a new trial under NRCP 50(b) and 59(a). The district court denied the motion, prompting the University to appeal.

DISCUSSION

Standard of Review

In appealing from the final judgment, the University contends that the district court erred in denying its motion for judgment notwithstanding the verdict or, in the alternative, motion for a new trial. On review of a motion denying a judgment notwithstanding the verdict, we are enjoined to view the evidence in the light most favorable to the party against whom the motion is directed. *Air Service Co. v. Sheehan*, 95 Nev. 528, 530, 594 P.2d 1155, 1156 (1979). It is not this court's prerogative to consider the weight of the evidence or the credibility of witnesses. Id. In reviewing the denial of the motion for JNOV, the question we must ask and answer is whether the evidence of record "'is such that reasonable men would have necessarily reached a different conclusion.'" *Id.* (quoting *Drummond v. Mid-West Growers*, 91 Nev. 698, 542 P.2d 198 (1975)). Of course, an order denying a JNOV motion will also be reversed if the final judgment is unwarranted as a matter of law. *See McDevitt & Street Co. v. Mosher Steel*, 574 So.2d 794, 797 (Ala.1991).

Affirmative Action Analysis

The University contends that the district court made a substantial error of law by failing to enter a proposed jury instruction which would have apprised the jury that Title VII does not proscribe race-based affirmative action programs designed to remedy the effects of past discrimination against traditionally disadvantaged classes. The University asserts that the district court's rejection of the proposed instruction left the jury with the impression that all race-based affirmative action programs are proscribed.

Farmer maintains that the University has not demonstrated that Makoba's race was "job related for the position in question and consistent with business necessities." Farmer also asserts that the University's unwritten minority bonus policy contravenes its published affirmative action plan. Finally, Farmer alleges that all race-based affirmative action plans are proscribed under Title VII of the Civil Rights Act as amended in 1991; therefore, the University discriminated against her as a female, a protected class under Title VII.

Tension exists between the goals of affirmative action and Title VII's proscription against employment practices which are motivated by considerations of race, religion, sex, or national origin, because Congress failed to provide a statutory exception for affirmative action under Title VII. See 42 U.S.C. § 2000e. Until recently, the Supreme Court's failure to achieve a majority opinion in affirmative action cases has produced schizophrenic results.

The permissible contours for voluntary affirmative action plans are blurred. There are, however, a few pivotal cases that provide guidance. In *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the *Bakke* plurality held that in the limited setting of a graduate school, an attempt to attain a diverse student body through a preferential treatment admissions policy is not per se unconstitutional as long as race is one of several factors used in evaluating applicants. *Id.* at 314-18, 98 S. Ct. at 2760-63. Quotas, however, are proscribed. *Id.* at 318, 98 S.Ct. at 2762-63.

United Steelworkers of America v. Weber, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), is the seminal case defining

permissible voluntary affirmative action plans. *See also Johnson v. Transportation Agency, Santa Clara County*, Cal., 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987). Under Weber, a permissible voluntary affirmative action plan must: (1) further Title VII's statutory purpose by "break[ing] down old patterns of racial segregation and hierarchy" in "occupations which have been traditionally closed to them"; (2) not "unnecessarily trammel the interests of white employees"; (3) be "a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Weber*, 443 U.S. at 208, 99 S.Ct. at 2730.

Since the advent of Weber, the Supreme Court's affirmative action decisions have displayed an accordion effect. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L. Ed.2d 854 (1989) (plurality opinion), signaled a marked departure of equal protection analysis by requiring that the strict scrutiny standard apply for affirmative action jurisprudence. The Court criticized the City of Richmond's minority set-aside program for independent contractors in the construction industry as one which was not sufficiently and narrowly tailored. A year after *Croson*, the Court, in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), abruptly changed course and held that the intermediate scrutiny standard of review applies towards congressionally mandated benign racial classifications.

Most recently, in *Adarand Constructors, Inc. v. Pena*, --- U.S. ----, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), the Supreme Court revisited affirmative action in the context of a minority set-aside program in federal highway construction. In the 5-4 opinion, the Court held that a reviewing court must apply strict scrutiny analysis for all race-based affirmative action programs, whether enacted by a federal, state, or local entity. *Id.* at ---- - ----, 115 S.Ct. at 2111-13. Building on the rationale of *Croson*, the Court explicitly stated "that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand*, --- U.S. at ----, 115 S.Ct. at 2117. In so holding, the Court overruled *Metro Broadcasting* which employed different

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University must be given the latitude to make its own employment decisions provided that they are not discriminatory.

In addition, Farmer cites no authority for her proposition that the 1991 amendments to Title VII proscribe affirmative action.[10] Notably, Farmer failed to include a contrasting provision which undermines her novel interpretation of § 2000e-2(m).[11]

Given the void created by the rejection of the jury instruction at issue, we conclude that the jury was not equipped to understand the necessary legal basis upon which it could reach its factual conclusions concerning the legality of the University's affirmative action plan. Moreover, the undisputed facts of this case warranted judgment in favor of the University as a matter of law. Therefore, even if the jury had been properly instructed, the district court should have granted the University's motion for judgment notwithstanding the verdict. Reversal of the jury's verdict on the Title VII claim is therefore in order.

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[10] 42 U.S.C. § 2000e-2(m) (Supp. V 1993) states:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrated that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

The conduct Farmer complains of occurred prior to the effective date of the amended 1991 Civil Rights Act; therefore, those applicable portions of the amended Act are not controlling. Makoba was hired on July 1, 1990, followed by Farmer's appointment on July 1, 1991. The Civil Rights Act of 1991 went into effect on November 21, 1991.

[11] "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are in accordance with the law." § 116, 105 Stat. at 1079 (1991) (codified at 42 U.S.C. § 1981 note (Supp. V 1993) (emphasis added)).

The Equal Pay Act

The University contends that it fully satisfied the requisites of the EPA and was entitled to judgment on this claim as a matter of law.

On the other hand, Farmer insists that the University's affirmative defense under the EPA was pretextual and that its true motivation for creating the wage disparity was rooted in gender discrimination. In order for Farmer to prevail on her EPA claim, she had to prove that the University's employment decision was impermissibly based on gender.

Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974), is the seminal case interpreting the Equal Pay Act.[12] The Supreme Court stated that a prima facie case under the EPA is established if the plaintiff can show: (1) that an employer is paying different wages to employees of the opposite sex; (2) that the employees are performing jobs which require equal skill, effort, and responsibility; and (3) that the employees have similar working conditions. *Id.* at 190, 94 S.Ct. at 2226.

After the plaintiff has presented a prima facie case, an employer must then satisfy one of the EPA's four affirmative defenses in order to avoid liability. In *Corning*, the Court concluded that the burden of proof in proffering one of the four affirmative defenses rests with the defendant, even though the Act is silent on this issue. The employer must prove that the reason for the pay disparity is due to: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity of production; or (iv) a differential based on any factor other than sex." *Id.* at 196, 94 S.Ct. at 2229.

The bulk of EPA litigation rests with the Act's fourth affirmative defense. The "any factor-other-than-sex" defense has often been referred to as a catch-all provision, and understandably, is the source of discriminatory abuse. In an effort to limit employer abuses under this catch-all provision, the courts have attempted to delineate nondiscriminatory factors other than sex. There is however, an

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[12] Sex-based discrimination is the gravamen of The Equal Pay Act of 1963. 29 U.S.C. § 206(d)(1).

acknowledged conflict among the circuit courts concerning an employer's burdens in raising this affirmative defense.

In *Aldrich v. Randolph Cent. School Dist.*, 963 F.2d 520, 526 (2d Cir.), *cert. denied*, 506 U.S. 965, 113 S.Ct. 440, 121 L.Ed.2d 359 (1992), the court held that an employer must establish a bona fide business-related reason for establishing the factor-other-than sex affirmative defense. Likewise, in *Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir.1986), the court determined that an employer satisfies the factor-other-than-sex defense by establishing legitimate organizational needs. *See Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir.1982) (a wage differential between a male and female must be grounded in an acceptable business reason); *E.E.O.C. v. J.C. Penney Co., Inc.*, 843 F.2d 249, 253 (6th Cir.1988) (any factor will not satisfy the factor-other-than-sex defense, rather, a legitimate business reason must exist).

The Seventh Circuit, in *Fallon v. State of Illinois*, 882 F.2d 1206, 1211 (1989), reached a contrary position in ruling that "[t]his circuit ... does not require that the factor-other-than-sex defense be related to the requirements of the particular position in question, or that it be a 'business-related reason[ ].'" We are not persuaded that the reasoning in *Fallon* furthers the purposes of the Equal Pay Act and elect to adopt the rationale and rulings of the Second and Ninth Circuits in *Aldrich* and *Maxwell*.

We conclude that the proper legal standard underlying the factor-other-than-sex defense requires, at a minimum, that an employer demonstrates a business-related reason for the wage disparity. It is essential that the factor-other-than-sex defense is business related in order to avoid the pitfalls otherwise created by such a broadly worded provision.

The most glaring statistic in this litigation is that only one percent of the University's faculty were black while eighty-seven percent were white. Concurrently, women occupied twenty-five to twenty-nine percent of the full-time faculty positions. The University sought to achieve progress in this manifest racial imbalance by hiring Makoba before Farmer. Clearly, the University had a bona fide business-related reason for attaining a culturally diverse faculty. It is undisputed that qualified minority applicants, who are in short supply, can command

premium salaries in the open market. The search committee elected to avoid an all-out bidding war with other educational institutions by offering Makoba a salary commensurate with his credentials, his minority status, and his overall marketability.

Farmer has failed to demonstrate that the University's pay disparity was rooted in gender discrimination. Indeed, the University's Dean of the College of Arts and Science testified that the Chemistry Department had recently hired a female chemist at a higher salary than a male with similar qualifications in order to diversify its faculty and provide a female role model. Market forces dictate higher salaries for female Ph.D.'s in chemistry due to a shortage of qualified women.

Although the jury would have been in a better position to understand what the University could or could not do with respect to wage disparity in the context of the EPA if Farmer's proposed instruction to the jury had been accepted by the district court, the University is in no position to complain since it failed to join in proffering the instruction and objecting to its rejection.[13] We nevertheless conclude that the omission of the instruction is of no consequence to the resolution of this appeal. The undisputed facts reveal that the University did not base its employment decision on Farmer's gender. To the contrary, a manifest racial imbalance and market factors were the touchstone for the University's employment decision.

We conclude that the University has met its burden in avoiding liability under the EPA by demonstrating a legitimate business- related reason for the wage disparity between Farmer and Makoba. This satisfies the EPA's fourth affirmative defense, "a differential based on any factor other than sex." *Corning*, 417 U.S. at 196, 94 S. Ct. at 2229. Under the undisputed facts and the law, the judgment entered against the University pursuant to Farmer's second cause of action must be reversed.

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[13] As noted previously in the body of this opinion, the rejected instruction offered by Farmer would have instructed the jury that: "The Equal Pay Act specifically forbids that Dr. Makoba's salary should be lowered to make two rates of pay equal."

Breach of Contract

The disposition of the Breach of Contract claim is derivative in nature and wholly dependent on the resolution of the EPA and Title VII claims. According to Farmer's strained reading of the University's Affirmative Action statement,[14] the unwritten minority bonus policy contravenes the University's affirmative action policy.

The University, as noted above, has adopted a lawful race-conscious affirmative action policy in order to remedy the effects of a manifest racial imbalance in a traditionally segregated job category. The unwritten minority bonus policy merely augments the University's Statement of Policy and Intent, which provides, in part: "Affirmative Action requires more than employment neutrality. It requires additional

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[14] The University of Nevada, Reno, Affirmative Action Statement of Policy and Intent provides in part:

> The University of Nevada, Reno, in conformity with the Affirmative Action policy of the University of Nevada System and Federal law, is guided by the principle that there shall be no difference in the treatment of persons because of race, creed, color, sex, disability, religion, age, veteran status or national origin, and that equal opportunity and access to programs shall be available to all. This principle is applicable to every member of the University community, students and employed personnel at every level, and to all units, facilities, and services of the university.
>
> In the employment of all personnel, the university recognizes that as a public agency, it is obligated to support Federal and State policies which seek to achieve affirmative action in employment for members of minority groups, women and the disabled....
>
> Affirmative Action requires more than employment neutrality. It requires the University of Nevada System to make additional efforts to recruit, employ, retain and promote qualified women, protected class minority group members, and the disabled.

efforts to recruit, employ, retain and promote qualified women, minorities, handicapped and veterans."

The University has aggressively sought to achieve more than employment neutrality by encouraging its departments to hire qualified minorities, women, veterans, and handicapped individuals. The minority bonus policy, albeit an unwritten one, is merely a tool for achieving cultural diversity and furthering the substantive goals of affirmative action.

For the reasons discussed above, the University's affirmative action policies pass constitutional muster. Farmer has failed to raise any material facts or law which would render the University's affirmative action policy constitutionally infirm.

In view of our disposition of this appeal, it is unnecessary to address other issues on appeal. We note in passing, however, that it would appear that the University should have received the benefit of a summary disposition of all of the claims against it, thereby obviating the time and expense of trial.

CONCLUSION

For the reasons discussed above, we conclude that the district court erred in denying the University's motion for judgment notwithstanding the verdict. We therefore reverse.

YOUNG and ROSE, JJ., concur.

SPRINGER, Justice, dissenting:

However "schizophrenic" the majority may find the United States Supreme Court's affirmative action jurisprudence, it is now firmly established that all racially discriminatory state actions, "benign" or otherwise, are permissible only if they are necessary to meet a compelling state interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. ----, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). I dissent because I do not think that the University's affirmative action program, enacted to remedy a perceived racial imbalance among the faculty, passes this strict standard of constitutional review; and I find no authority for the majority's assertion that "fostering a culturally and ethnically diverse faculty" is a sufficiently compelling reason for intentional racial discrimination by Nevada's public university.

In *Hopwood v. State of Texas*, 78 F.3d 932, 945-46 (5th Cir. 1996), cert. denied, --- U.S. ----, 116 S.Ct. 2581, 135 L.Ed.2d 1095 (1996), the United States Court of Appeals for the Fifth Circuit recently rejected the notion that an attempt to achieve racial diversity will satisfy this strict scrutiny standard.[1] As the *Hopwood* court noted, Justice Powell's diversity argument in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L. Ed.2d 750 (1978), relied upon by the majority, garnered only his own vote and has never represented the view of a majority of the Supreme Court. 78 F.3d at 944. After review of the relevant Supreme Court cases, I turn to Hopwood and conclude that the racially discriminatory action taken by the University is constitutionally impermissible. "Cultural and ethnic diversity" simply cannot justify the University's undisguised racial discrimination in the pursuit of a more racially heterogeneous faculty.[2]

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[1] *Cf. Taxman v. Board of Educ. of Township of Piscataway*, 91 F.3d 1547, 1558-63 (3rd Cir.1996), petition for cert. filed (Congress neither addressed nor embraced racial diversity "for education's sake" as a purpose of Title VII, and nothing in federal case law, including the Supreme Court's equal protection cases, supports recognition of such a purpose.).

[2] One compelling interest recognized by the Supreme Court is remedying the effects of prior discrimination. *See, e.g., North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46, 91 S. Ct. 1284, 1286, 28 L.Ed.2d 586 (1971); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). However, remedial race-based state action passes constitutional muster only if the race-based action is taken to remedy prior discrimination by the involved governmental unit, and not simply in response to statistical disparities resulting from general societal discrimination. *Wygant*, 476 U.S. at 277-78, 106 S.Ct. at 1848-49 (plurality opinion of Powell, J.); *accord Croson*, 488 U.S. 469, 109 S. Ct. 706.

In the present case, in spite of the majority's loose reference to Dr. Makoba's position as a "traditionally segregated job category," the

(continued...)

I dissent from the majority opinion's affirmative action analysis. I also dissent from the majority's equal pay act analysis and join Justice Shearing's dissenting opinion in this regard. Accordingly, I would affirm the judgment of the district court.

SHEARING, Justice, dissenting:

I do not agree that the University was entitled to judgment as a matter of law on the cause of action alleging that the University violated 29 U.S.C. Sec. 206(d), the Equal Pay Act. I would affirm the judgment in favor of Farmer on that cause of action.

This case was submitted to a jury which reached a verdict in favor of Farmer. As the majority stated, on review of a motion denying judgment notwithstanding the verdict, this court must view the evidence in the light most favorable to the party against whom the motion is directed. *Air Service Co. v. Sheehan*, 95 Nev. 528, 530, 594 P.2d 1155, 1156 (1979). It is not this court's prerogative to consider the weight of the evidence or the credibility of witnesses. *Id.* The question we must ask and answer is whether the evidence of record is such that reasonable people would have necessarily reached a different conclusion. *Id.*

Accordingly, we must view the evidence in the light most favorable to Farmer. Regardless of our own inclinations, we must accept the fact that the jury believed that the disparity in pay between Farmer and her male colleague was based on gender discrimination. The University presented evidence that other factors were responsible for the disparity in pay between Farmer and her male colleague. Obviously the jury did not believe the University's witnesses. The University does not dispute that the jury was correctly instructed on the

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[2] (...continued)
University has made no showing whatsoever that it has discriminated against blacks in hiring. In fact, as recognized by the majority, the purpose of the University's affirmative action hiring policy is simply to rectify a "manifest racial imbalance" among the faculty. Consequently, this is not a case of remedial affirmative action. Even if it were, it is difficult to see how hiring a recent emigrant from Africa would be an appropriate remedy for prior discrimination against black Americans.

requirements and the burdens of proof under the Equal Pay Act. Appellant's only assignment of error in the instructions related to the allegations of violation of Title VII of the Civil Rights Act.

Therefore, we are obligated to affirm the verdict and judgment of the trial court with regard to violation of the Equal Pay Act.

IN THE SUPREME COURT OF THE STATE OF NEVADA

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA, Appellant, vs. YVETTE FARMER, Respondent.	No. 25912

FILED
Nov 21 1997
Janette M. Bloom
Clerk of Supreme Court

By // J. Richards //
Chief Deputy Clerk

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

//Shearing//, C.J.
Shearing

//Springer//, J.
Springer

//Rose//, J.
Rose

//Young//, J.
Young

cc: Hon. Steven R. Kosach, District Judge
~~Donald Klasic~~, General Counsel University of Nevada (Thomas J. Ray)
Goedert & Michaels
Judie Bailey, Clerk

---

[1] We grant respondent's motion to file errata to the petition for rehearing, as well as respondent's motion to supplement authorities pursuant to NRAP 31(d). We have considered respondent's supplemental authorities in reaching our decision.

The Honorable A. William Maupin, Justice, did not participate in the decision on rehearing.

C-1

Case No. CV93-00223

FILED:
'94 MAR 23 A10:38

Dept. No. 8

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF WASHOE

YVETTE FARMER,

Plaintiff,

v.

(PROPOSED)
ORDER ENTERING JUDGMENT

UNIVERSITY AND COMMUNITY
COLLEGE SYSTEM OF NEVADA,
BLACK & WHITE, INC., I-V,
corporations, inclusive,
DOES 1-10, inclusive,

Defendants.

_____/

This case having regularly come on for trial to jury on February 14, 1994, the jury having returned a verdict for plaintiff on February 16, 1994 finding that (1) defendant violated 29 U.S.C. § 206(d), the Equal Pay Act; (2) defendant violated 42 U.S.C. 2000e as amended by the Civil Rights Act of 1991; and (3) defendant breached its contract of employment with plaintiff, and the jury having awarded damages in the amount of $40,000.00.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that defendant pay to plaintiff the sum of $40,000.00 as back pay from her hire date until February 21, 1995 and that defendant raise plaintiff's annual compensation, exclusive of any merit pay which she may earn in the interim, to $44,488.00 effective February 21, 1995, said $44,488 to be prorated for the 1994-1995 academic year as follows: $263.24 per each academic day remaining in the 1994-1995 academic year ($44,488.00 divided by 169 academic days = $263.24).

Dated this 22 day of March, 1994.

//signed//
DISTRICT JUDGE

D-1

Case No. CV93-00223

Dept. No. 8

FILED:
'94 MAR 24 P13:08
C. Parsley

IN THE SECOND JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

YVETTE FARMER,

Plaintiff,

v.

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA, BLACK & WHITE, INC., I-V, corporations, inclusive, DOES 1-10, inclusive,

Defendants.

/

NOTICE OF ENTRY OF ORDER ENTERING JUDGMENT

TO: University and Community College System of Nevada, and

TO: Donald Klasic, its attorney of record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that on March 23, 1994, an Order Entering Judgment was signed in the above action.

A copy of said Order Entering Judgment is attached hereto.

GOEDERT & MICHAELS

By //ERICA MICHAEL//
Erica Michaels

Attorneys for Plaintiff

(2)

Supreme Court, U.S.
FILED
FEB 5 1998
CLERK

No. 97-1104

In The

Supreme Court of the United States

October Term, 1997

YVETTE FARMER,

Petitioner,

vs.

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA,

Respondent.

On Petition for Writ of Certiorari to the Nevada Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Petition for Writ of Certiorari present compelling reasons sufficient to justify this Court's exercise of its discretionary authority in favor of granting the Petition?

2. Does the Petition for Writ of Certiorari contain misstatements of fact or law that bear on what issues would properly be before the Court if Certiorari were granted?

3. Does Title VII of the Civil Rights Act of 1964, as amended, permit employers to take race into account as a plus factor where there has been a manifest imbalance in a traditionally segregated job category and the action does not trammel the rights of others?

4. Whether the issues relating to The Equal Pay Act of 1963 pertain to factual findings and, therefore, are not properly before this Court on a Petition for Writ of Certiorari?

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STATEMENT OF THE CASE

Petitioner, Yvette Farmer (hereinafter referred to as "Farmer"), seeks this Court's review by certiorari claiming that she has been denied employment in violation of Title VII of the Civil Rights Act. As will be set forth in this opposition, extraordinary review by certiorari is not warranted in this case for the opinion of the Nevada Supreme Court in *University and Community College System of Nevada v. Farmer*, 930 P.2d 730 (Nev. 1997), is consistent with this Court's opinions in *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979); and *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987). Further, Farmer contends that the Court should grant her petition based upon the claim that the Nevada Supreme Court's opinion in *Farmer, supra,* is in direct conflict with the United States Court of Appeals' (Third Circuit) opinion in *Taxman v. Piscataway Township Board of Education*, 91 F.3d 1547 (3d Cir. 1996). This perceived conflict is based upon a misstatement of the facts and the law applicable thereto and, as will be shown, this case and *Taxman, supra*, are readily distinguishable.

University of Nevada, Reno is a university within the University and Community College System of Nevada (Respondent herein). Respondent will be hereinafter referred to as UNR. In 1989-1991, only 1% of UNR's academic faculty were black and 87% to 89% of its academic faculty were white. During this same time 25% to 27% of the full-time faculty were women. In order to rectify the racial imbalance, UNR had temporarily adopted an affirmative action policy, referred to as the minority bonus policy. The policy provided that for every minority hired in a department, a new employment position would be created. The purpose of the policy was to encourage UNR's departments to hire qualified minorities by rewarding

the departments with additional staff, to redress the conspicuous imbalance in minority staffing at UNR and to expose UNR's students to the experience of working with a racially mixed faculty. Petitioner's Appendix A-2 (hereinafter referred to as App.).

During the 1990-1991 academic year, Johnson Makoba (a black African male) applied for the advertised position of assistant professor in UNR's Sociology Department. Although Farmer (a white female) was one of three finalists for the position, Makoba ranked first among the three finalists. App. A-2. UNR, therefore, hired Makoba. Because Makoba was a minority, an additional employment position was created in the Sociology Department, and during the next academic year (1991-1992), Farmer was hired as an assistant professor to fill the newly created position. App. A-3.

Because there were so few black Ph.D.'s nationwide, and because UNR's officials knew Makoba was interviewing at other universities and were fearful of losing him to another university, UNR offered Makoba a higher salary than was advertised. Makoba started at $35,000 with a $5,000 increase upon completing his dissertation. The advertised starting salary range was $28,000 to $34,000. Farmer was offered a starting salary of $31,000 and a $2,000 raise after completion of her dissertation. Farmer's salary was slightly above the mean for new hires in the social sciences. App. A-2, A-3.

Based upon these facts, Farmer claimed that the decision to hire Makoba was discriminatory in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-(2)a. She also claimed that the pay differential was in violation of the Equal Pay Act, 29 U.S.C. § 206(d). It should be noted that having lost the Equal Pay Act claim, based upon a factual finding that the decision was for reasons unrelated to sex (29 U.S.C.

§ 206(d)(1)(iv)), Farmer now claims that the pay differential was in violation of Title VII. App. A-9 through A-11. *See also* Petitioner's Brief, p. i.

Nonetheless, the central issue is whether the decision to hire Makoba as opposed to Farmer was discriminatory in violation of Title VII of the Civil Rights Act. The salient facts which must be considered in determining this issue are: (1) Makoba was at least as qualified if not better qualified than Farmer for the position (App. A-2, A-3, A-7); (2) a manifest racial imbalance existed among the faculty at UNR (1% of the faculty were black and 87%-89% were white); (3) pursuant to a temporary affirmative action plan, upon Makoba's hire an additional position was created in the Sociology Department which resulted in the hiring of Farmer; and (4) no one lost their job as a result of the decision to hire Makoba.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT COMPELLING REASONS SUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF ITS DISCRETIONARY AUTHORITY IN FAVOR OF THE PETITIONER.

U.S. Sup. Ct. Rule 10 provides that review by a writ of certiorari is not a matter of right but a matter of the Court's discretion. The Rule also provides that a petition will only be granted for compelling reasons. The basis that Farmer cites in support of her claim that compelling reasons exist to support her petition is that the Nevada Supreme Court's opinion in this case is in direct conflict with the Third Circuit's opinion in *Taxman, supra.* Petitioner's Brief pp. 8-9.

U.S. Sup. Ct. Rule 10, (a)-(c) does generally provide that a writ of certiorari is proper where a state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States court of appeals. However, as will be shown, the decision of the Nevada Supreme Court in this case is not in conflict with the opinion of the Third Circuit in *Taxman*. To the contrary, the two decisions can be harmonized as their supporting facts are readily distinguishable. In that the decisions are not conflicting, there is no compelling reason for granting a writ of certiorari and the petition should be denied.

II.

THE PETITION FOR WRIT OF CERTIORARI CONTAINS MISSTATEMENTS OF FACT AND LAW THAT BEAR ON WHAT ISSUES PROPERLY WOULD BE BEFORE THE COURT IF CERTIORARI WERE GRANTED.

U.S. Sup. Ct. Rule 15(2) requires that the brief in opposition include any perceived misstatements of fact or law in the petition which bear on the issues properly before the Court if certiorari were granted. UNR believes that the petition contains the following misstatements of fact and law which materially affect the issues before the Court.

Misstatements of fact and law:

1) Farmer states at page 4 of her petition as follows: "Although Farmer asserted on appeal that the record established she was more qualified for the position, the court below found that Farmer and Makoba 'were equal in most respects.' " This statement is taken out of context and is, therefore, somewhat misleading. The Nevada Supreme Court found that:

> Although Farmer contends that she was more qualified for Makoba's position, the search committee determined that Makoba's qualifications slightly exceeded Farmer's. The record, however, reveals that both candidates were equal in most respects.

App. A-7.

While this may be perceived to be splitting hairs, the evidence reflects that between the two Makoba was the most qualified. That being the case, the action is not even about Title VII or affirmative action, for quite simply the individual most qualified for the job was hired. If anything, UNR's affirmative action plan benefited Farmer. As Makoba was a minority, an additional faculty position was created in the Sociology Department and Farmer was hired!

2) At pages 19-20 of the petition, Farmer cites statistics from the *United States Bureau of the Census Population Paper Listing 49, Population of States by Race and Hispanic Origin*, April 1, 1990. This Paper purportedly indicates that in 1990 the population of the City of Reno was 2.8% black. Farmer goes on to argue that a faculty ratio of 1% black compared to 89% white is not a racial imbalance when the black population of the City of Reno is 2.8%.

The statistical evidence noted above was not part of the record below and is being added here for the first time. It should not be considered by the Court in this petition. Further, the focus of the Nevada Supreme Court was the statistical makeup of the faculty. A comparison of the number of black Ph.D.'s to the number of blacks who resided in the City of Reno was never the focus. As an aside, petitioner acknowledges that the percentage of black faculty at UNR (1%) is similar to the balance

of higher education throughout the United States. This is an acknowledgement of UNR's need to offer Makoba a slightly higher salary if UNR was going to be able to attract this candidate and that there was a manifest racial imbalance in this job category.

More importantly, in determining the validity of an affirmative action plan this Court has never compared the number of minorities at a particular place of employment with the number of minorities in the community. In determining whether a racial imbalance exists, the focus has always been upon the particular work force or craft in question. *See Weber, supra* and *Johnson, supra.* To suggest otherwise would be an invitation to discrimination.

3) Farmer argues throughout her brief that this Court has not addressed the issue of whether Title VII of the Civil Rights Act permits ". . . employers to take race into account for purposes other than remedying past discrimination." Petitioner's Brief, p. 1. Farmer's argument is that this Court has not decided whether racial preferences can be taken into consideration in order to promote racial diversity. Farmer argues that the Nevada Supreme Court has ruled in this case that it is permissible while in *Taxman,* the Third Circuit ruled that it is not. Thus, Farmer argues, the need for the Court's review in this case.

This is not the case, for as the Court noted in *Johnson,* an employer need not point to its own prior discrimination; it need only show an imbalance in traditionally segregated job categories.

> As Justice BLACKMUN's concurrence made clear, *Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an

> "arguable violation" on its part. *Id.*, at 212, 99 S.Ct., at 2731. Rather, it need point only to a "conspicuous . . . imbalance in traditionally segregated job categories."

Johnson v. Transp. Agency Santa Clara City, Cal., 480 U.S. at 630, 107 S. Ct. at 1451.

The issue in *Taxman* was very narrow.

> Specifically, we must decide whether Title VII permits an employer with a *racially balanced work force* to grant a non-remedial racial preference in order to promote "racial diversity."

Taxman v. Board of Educ. of Township of Piscataway, 91 F.3d at 1549-1550 (emphasis added).

Farmer has misstated the issue presented in *Taxman*. *Taxman*, as was the holding in *Weber* and *Johnson*, does not stand for the proposition that racial preferences may not be considered to remedy a "conspicuous imbalance" in the work force. Rather, *Taxman* stands for the proposition that racial preferences may not be considered in a decision to lay off an employee where there is a racially *balanced* work force. In this case, consistent with *Weber* and *Johnson*, the Nevada Supreme Court found that the policy was adopted in order to rectify the racial imbalance. App. A-2.

III.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PERMITS AN EMPLOYER TO TAKE RACE INTO ACCOUNT AS A PLUS FACTOR WHERE THERE HAS BEEN A MANIFEST IMBALANCE IN TRADITIONALLY SEGREGATED JOB CATEGORIES AND THE ACTION DOES NOT TRAMMEL THE RIGHTS OF OTHERS.

This is the issue that the Court should address in determining whether there is a compelling reason to grant Certiorari. It is submitted that there is no compelling reason for there is no conflict with the decisions entered in *Taxman* and the Nevada Supreme Court in this case. The facts of this case and the facts of *Taxman* are readily distinguishable. In other words, the facts in *Taxman* are beyond the Court's holdings in *Weber* and *Johnson*. The facts of this case are within the parameters of *Weber* and *Johnson*.

It should be noted that, as Farmer acknowledges, this case did not challenge UNR's actions on the basis of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Petitioner's Brief, page 13, n.5. Thus, review is limited to Title VII analysis.

In *Weber* and *Johnson* the Court held that an affirmative action plan is permissible where it is designed to mirror the goals of Title VII (to eliminate work force imbalances in traditionally segregated job categories) and does not unnecessarily trammel the interests of white employees. *See United Steelworkers v. Weber*, 443 U.S. at 208, 99 S. Ct. at 2730 and *Johnson v. Transp. Agency, Santa Clara City, Cal.*, 480 U.S. at 637-638.

In the case before the Court, the Nevada Supreme Court found that there was an imbalance in a traditionally segregated

job category. The full time faculty consisted of 1% black and 89% white. The lower court further found that the policy was put in place in an effort to rectify that imbalance. This clearly meets the first prong of *Weber* and *Johnson*. Further, the fact that Makoba's race was taken into account was only one "plus factor" and arguably Makoba was the most qualified of the two candidates.

As to the second prong, the minority bonus plan eliminated any harsh impact on whites. By hiring a minority an additional position was created which was filled by Farmer (a white). Thus, the plan did not "trammel" the interests of others. Rather, the plan served to eliminate any adverse impact upon non-minorities. It must be stressed that no one lost their job and any adverse impact created by the plan was minimal.

Thus, the facts of this case satisfy the two pronged test contained in *Weber* and *Johnson* and do not present any conflict with the holdings of this Court. The decision in *Taxman*, on the other hand, is not in conflict with the decision of the lower court in this case, for *Taxman* fails to satisfy either element of the *Weber* test.

In *Taxman*, the Third Circuit merely found that the Board of Education's decision to lay off a white teacher over a black teacher violated Title VII because the decision did not satisfy either element of the *Weber* test.

The school board was faced with layoffs. The Board decided to release a white teacher over a black teacher. Both teachers were equally qualified and held equal seniority. The stated reason for releasing the white teacher was for racial diversity. However, the Board acknowledged that the school's work force was racially balanced.

Under these facts, the Third Circuit found that the Board's decision could not satisfy the first element of *Weber*. The decision was not intended to remedy any prior discrimination and the Board acknowledged that blacks were not under-represented in the teaching work force in general or at Piscataway High School in particular. *Taxman, supra*, at 1563.

> . . . we are constrained to hold, as did the district court, that inasmuch as "the Board does not even attempt to show that its . . . affirmative action plan was adopted to remedy past discrimination or as the result of a manifest imbalance in the employment of minorities," 832 F.Supp. at 845, the Board has failed to satisfy the first prong of the *Weber* test.

Taxman, supra at 1563.

The Third Circuit Court of Appeals also held that the action failed to satisfy the second prong of the *Weber* test, for the Board's decision "unnecessarily trammel[s]" the interests of non-minorities. In this regard the court stated:

> . . . we are convinced that the harm imposed upon a non-minority employee by the loss of his or her job is so substantial and the cost so severe that the Board's goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion.
>
> * * *
>
> Accordingly, we conclude that under the second prong of the *Weber* test, the Board's affirmative action policy violates Title VII.

Taxman, supra at 1564-1565.

Contrary to what Farmer would have you believe, the authorities cited in the petition are not in conflict and create no ill founded propositions of law. In *Taxman*, the Third Circuit holding was consistent with this Court's holdings in *Weber* and *Johnson*, for the facts did not satisfy the *Weber* test. In this case, the lower court correctly found that the actions of UNR were consistent with the decisions of this Court, for the minority bonus policy was implemented to rectify a conspicuous imbalance in the work force and the policy did not trammel the interests of a non-minority, for the policy created an additional position which was filled by a qualified non-minority.

In sum, the two decisions are not in conflict. The cases are simply distinguishable.

IV.

THE ISSUES RELATING TO THE EQUAL PAY ACT OF 1963 PERTAIN TO FACTUAL FINDINGS AND, THEREFORE, ARE NOT PROPERLY BEFORE THIS COURT ON A PETITION FOR WRIT OF CERTIORARI.

Farmer claims for the first time that the starting pay differential is in violation of Title VII. This should not be considered at this point. At all times prior to this, Farmer's argument had been that the pay differential was in violation of the Equal Pay Act, 29 U.S.C. § 206(d). The lower court ruled against Farmer, finding that the pay differential was based upon a factor other than sex, i.e., market factors. App. A-9 through A-11.

A petition for writ of certiorari is not a proper vehicle to review factual findings.

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual

> findings or the misapplication of a properly stated rule of law.

U.S. Sup. Ct. Rule 10.

The Court should not review the lower court's factual findings regarding Farmer's Equal Pay Act claim. If the Court is to consider the pay differential issue as a possible violation of Title VII, it must be stressed that this was not raised before nor considered by the lower court. In any event, the modest starting pay differential did not "unnecessarily trammel" the interests of Farmer.

CONCLUSION

The decisions raised by petitioner are not in conflict. For the reasons shown, the two cases are readily distinguishable and both were decided in harmony with the Court's opinions in *Weber* and *Johnson*. There is no compelling reason for the Court to grant the petition for writ of certiorari. Accordingly, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
FEB 19 1998
CLERK

No. 97-1104

In the

Supreme Court of the United States

October Term, 1997

YVETTE FARMER,
Petitioner,

v.

UNIVERSITY AND COMMUNITY
COLLEGE SYSTEM OF NEVADA,
Respondent.

Petition for Writ of Certiorari to the Nevada Supreme Court

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In addressing the propriety of a race-based employment decision under Title VII of the Civil Rights Act of 1964, the court below held: "The University demonstrated that it has a compelling interest in fostering a culturally and ethnically diverse faculty." Petition for Writ of Certiorari, Appendix (App.) A-7. In addressing the propriety of a race-based employment decision under Title VII of the Civil Rights Act of 1964, the United States Court of Appeals for the Third Circuit held that "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547, 1558 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997). These decisions are in conflict. This conflict warrants review by this Court.

THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER NONREMEDIAL RACE-BASED EMPLOYMENT DECISIONS ARE EVER PERMISSIBLE UNDER TITLE VII OF THE CIVIL RIGHTS ACT

The petition for writ of certiorari argued that this Court should grant review to resolve an important question of federal law that currently divides the lower courts. Respondent's Brief in Opposition (Respondent's Brief) claims that the *Taxman* decision and the case at bar are factually distinguishable. It does not, however, attempt to explain how the Nevada Supreme Court's legal conclusion that racial diversity is a permissible goal under Title VII can be reconciled with the Third Circuit's legal conclusion that diversity is not a permissible goal under Title VII. As respondent, the University and Community

College System of Nevada (University), concedes by this omission, these two legal conclusions cannot be harmonized. Although the University makes no attempt to defend the lower court's decision that the desire to achieve a "racially diverse" workforce allows an employer to contravene the plain language of Title VII, the University's brief does require petitioner, Yvette Farmer, to make two points of clarification.

A. The Facts of the Case

A jury found Yvette Farmer had been discriminated against by the University and awarded her $40,000 in damages. App. A-4. The Nevada Supreme Court found that, as candidates for the position, Yvette Farmer and Johnson Makoba were "equal in most respects." App. A-7. That court held, however, that the University did not violate Title VII by hiring Mr. Makoba, and not Ms. Farmer, because of its desire to achieve a racially diverse faculty. Despite these facts, the University relies on assertions rejected by the jury and the Nevada Supreme Court to argue that Mr. Makoba was the more qualified candidate and, therefore, that this case "is not even about Title VII or affirmative action, for quite simply the individual most qualified for the job was hired." Respondent's Brief at 5. This argument cannot withstand scrutiny.

It is basic hornbook law that a factual issue, such as which of two candidates is more qualified for a job, is to be decided by the trier of fact. In this case, the trier of fact awarded Yvette Farmer $40,000 in damages because of the University's discrimination. App. A-4. In order to find that Ms. Farmer had been discriminated against, the jury could have found that she was ***more*** qualified than Mr. Makoba, or they could have determined that she and Mr. Makoba were ***equally*** qualified.

What they could not have found, however, is that Ms. Farmer had been discriminated against by the University because she was ***less*** qualified than the candidate they hired. Simply put, had the more qualified candidate been hired, there would have been no finding of discrimination. This factual finding was not disturbed by the Nevada Supreme Court.[1] Had the court below determined that Mr. Makoba was more qualified than Ms. Farmer, it would have been completely unnecessary for the court to engage in a discussion of the University's racially discriminatory hiring program. The court below did, however, engage in an extensive--albeit erroneous--analysis of the legality of the University's hiring program. "We also view the desirability of a racially diverse workforce as sufficiently analogous to the constitutionality permissible attainment of a racially diverse student body countenanced by the *Bakke* Court." App. A-5. That section of the lower court's opinion, which it entitled "Affirmative Action Analysis," would have been entirely superfluous had it (or the jury below) determined that Mr. Makoba was more qualified for the position than Ms. Farmer. It is too late in the day for the University to argue that this "is not even a case about Title VII or affirmative action." Respondent's Brief at 5. The jury, the majority opinion of the Nevada Supreme Court, and dissenting opinion of the Nevada Supreme Court have all recognized that this most certainly is a case about Title VII and affirmative action.

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[1] According to the court below, "the curriculum vitae for both candidates revealed comparable strengths with respect to their educational backgrounds, publishing, areas of specialization, and teaching experience. The search committee concluded that despite some inequalities, their strengths and weaknesses complemented each other." App. A-2, A-3.

B. The Legal Issues of the Case

Essentially, the University argues that this case is more similar to *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987), than to *Taxman* and, therefore, the petition for writ of certiorari should be denied. This argument fails as a matter of law and fact.

In *Weber*, this Court examined the employment practices of an aluminum and chemical plant located in rural Louisiana. Although 39% of the local workforce was black, only 1.83% (5 out of 273) of the skilled craft workers were black. *Weber*, 443 U.S. at 198-99. Recognizing that Title VII was enacted to "eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Weber*, 443 U.S. at 204, this Court upheld the employer's use of a racially discriminatory training program. In *Johnson*, this Court was confronted with a job category in which ***none*** of 238 positions available had been held by a woman. *Johnson*, 480 U.S. at 621. Summarizing the holdings of these cases, the Third Circuit recently explained that, while *Weber* and *Johnson* tolerate racial and gender preferences "to erase the effects of prior discrimination, ***these rulings do not open the door to additional non-remedial deviations***." *Taxman*, 91 F.3d at 1558 (emphasis added).

This case falls outside the parameters of permissible race-conscious employment decisions established by *Weber* and *Johnson*. Unlike those cases, "this is not a case of remedial affirmative action." App. A-14 n.2. (Springer, J., dissenting). The University recognizes that its percentage of black faculty "is similar" to the balance of black faculty at institutions of

higher education throughout the United States. Respondent's Brief at 5-6. The University never refutes Ms. Farmer's claim that the racial balance of the University's full-time instructional faculty is nearly a mirror image of the average racial balance of all institutions of higher learning in the United States.[2] These statistics serve to underscore the finding of the Nevada Supreme Court that qualified minority Ph.D. candidates are in "short supply." App. A-3, A-10.

Hence, this is not a case where only 1.83% of the craft workers are black, although 39% of the workforce are black. Nor is this a case where none of the 238 positions in the applicable job category is held by a woman. Instead, this is a case where the University faculty is composed of between 11% and 13% minority full-time faculty members. App. A-2. A racial composition that is nearly identical to the average racial composition of all United States institutions of higher learning. The statistics underlying this Court's decisions in *Weber* and *Johnson* betrayed an atrocious pattern of discrimination. The statistics in this case, on the other hand, show a University faculty that is as racially diverse as the average University faculty in this country. The 11% to 13% minority faculty at the University of Nevada at Reno is a far cry from the less than

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[2] The University, although never questioning the accuracy of Ms. Farmer's statistics, does object to their being raised in the petition. Respondent's Brief at 5-6. In *Weber*, relying in part on government studies, this Court took judicial notice of the fact that exclusions from crafts on racial grounds had occurred. *Weber*, 443 U.S. at 198 n.1. Likewise, this Court should take judicial notice of the United States Department of Education's statistics offered by Ms. Farmer in this case.

2% minority workforce in *Weber* or the complete absence of female employees at issue in *Johnson*. The court below did not find that the University's unwritten affirmative action program was necessary to remedy prior discrimination. Rather, the court found that the University was justified in hiring Mr. Makoba, and then paying him significantly more than his colleagues,[3] based on the University's desire to increase the racial diversity of its faculty. App. A-7, A-11. This rationale is in conflict with the *Taxman* decision which held that, "unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute and, therefore, cannot satisfy the first prong of the *Weber* test." *Taxman*, 91 F.3d at 1557.

Contrary to the University's arguments, the issue in *Taxman* was not narrow nor has Ms. Farmer misstated the issue in that case. Respondent's Brief at 7. Although the facts of the *Taxman* case may have been unique, the legal issue presented by that case is broad enough to affect every employer in the country who is subject to Title VII: Does Title VII of the Civil Rights Act of 1964, as amended, permit employers to take race into account for purposes other than remedying past discrimination? This Court has already recognized that this question is worthy of review. *Taxman*, 117 S. Ct. 2506. Now, with the split of authority generated by the Nevada Supreme Court's opinion, the

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[3] From the outset of this litigation, Ms. Farmer has contended that the pay differential violated ***both*** the Equal Pay Act and Title VII. Hence, it is erroneous for the University to claim that the pay difference was not raised as a violation of Title VII below. It is also erroneous to suggest, as the University does, that a $10,838 pay deferential did "not unnecessarily trammel" Ms. Farmer's interests. Respondent's Brief at 12.

resolution of this issue becomes even more imperative. For these reasons, this Court should grant the petition for a writ of certiorari.

DATED: February, 1998.

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